No. 82744-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

MATTHEW J. HIRSCHFELDER
Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

THE HONORABLE DAVID FOSCUE, JUDGE

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I. ISSUE

Whether former RCW 9A.44.093(1)(b)[1] criminalizes sexual intercourse between a school employee and an 18-year-old registered student of the school?

II. ARGUMENT

A. THE PLAIN LANGUAGE OF FORMER RCW 9A.44.093(1)(b) ESTABLISHES THE VICTIM MUST BE A REGISTERED STUDENT, AT LEAST 16 YEARS OLD AND MORE THAN 60 MONTHS YOUNGER THAN THE DEFENDANT BUT DOES NOT REQUIRE THE VICTIM TO BE UNDER 18 YEARS OF AGE .

Statutory interpretation is a question of law, subject to de novo review.[2] The first step of statutory analysis is to look at the language of the statute to determine its plain meaning.[3] Courts shall avoid unlikely or absurd results.[4] If the statute is not clear and unambiguous on its face, other factors beyond the plain language of the statue are considered.[5]

1. Former RCW 9A.44.093(1)(b) is directed at the employee's abuse of his or her position, rather than the maturity of the student.

Former RCW 9A.44.093 criminalizes a school employee's abuse

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[1]The Legislature amended RCW 9A.44.093 during the 2009 session to ensure that its original intent of covering all enrolled students would be fulfilled. *See* Laws of 2009, ch. 324 (effective date July 26, 2009); House Bill Report HB 1035 (2009); Engrossed House Bill Report EHB 1035 (2009); Engrossed Senate Bill Report EHB 1035 (2009).

[2]*City of Spokane v. County of Spokane*, 158 Wash.2d 661, 146 P.3d 893 (2006).

[3]*State v. Westling*, 145 Wash.2d 607, 610, 40 P.3d 669 (2002).

[4]*State v. Neher*, 112 Wash.2d 347, 351, 771 P.2d 330 (1989).

[5]*Bell v. United States*, 349 U.S. 81, 84, 75 S.Ct. 620, 99 L.Ed. 905 (1955).

of authority and is distinct from statutes in which age is the only criteria for determining who is a victim. A school employee has a recognized position of authority over a registered student and former RCW 9A.44.093(1)(b)'s regulation of sexual intercourse between school employees and students prohibits abuse of this position of authority.[6]

The term "registered student" does not directly limit the age of the victim but defines a victim as a person in a relationship with an unequal balance of authority.[7] "[T]he primary intent of RCW 9A.44 is to prohibit acts of unlawful sexual intercourse, with punishment dependent on the accompanying circumstances."[8] Those accompanying circumstances may involve exclusively the age of the victim[9], but often involve a coercive relationship regardless of the age of the victim.[10]

In 1988 the legislature enacted RCW 9A.44.093 and 9A.44.096, Sexual Misconduct with a Minor in the First and Second Degrees and

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[6]*State v. Clinkenbeard*, 130 Wash.App. 552, 565-67, 123 P.3d 872 (2005); *see also State v. Grewe*, 117 Wash.2d 211, 216, 813 P.2d 1238 (1991); *State of Connecticut v. McKenzie-Adams*, 281 Conn. 486, 506-08, 915 A.2d 822 (2007).

[7]Use of the phrase "abuse of authority" is not intended to mean "abuse of trust". As the Second Division Court of Appeals distinguished these two in *State v. Marcum*, 61 Wash.App. 611, 614-15, 811 P.2d 963 (1991), authority relates to power and obedience where as trust is an assured reliance or dependence.

[8]*State v. Calle*, 125 Wash.2d 769, 781, 768 P.3d 155 (1995) *citing State v. Birgen*, 33 Wash.App. 1, 9, 651 P.2d 240 (1982), *review denied*, 98 Wash.2d 1013 (1983).

[9]RCW 9A.44.073 Rape of a Child in the First Degree; RCW 9A.44.076 Rape of a Child in the Second Degree; RCW 9A.44.079Rape of a Child in the Third Degree.

[10]RCW 9A.44.160 prohibits sexual intercourse between law enforcement officers and persons detained or under arrest regardless of the age of either the law enforcement officer or the person detained or under arrest.

deleted section (1)(c) from former RCW 9A.44.100. Prior to this amendment, crimes involving school employees sexual assaults against students were charged under former RCW 9A.44.100, indecent liberties. This prior statute criminalized sexual contact between a person who abused a position of authority over a victim under sixteen when the perpetrator was more than forty-eight months older than the victim.[11]

In *State v. Grewe*, the defendant was a school bus driver and the victims were 11 year old students either waiting for or riding on the defendant's school bus.[12] *Grewe* was charged under subsection (1)(b), which criminalized sexual contact between a perpetrator and a victim who was under fourteen years old. The section did not require abuse of authority. The Court in *Grewe* concluded that violation of a position of trust could still be applied as an aggravating factor because there is an inherent abuse of authority in sexual contact or intercourse between a school employee and a student.[13]

Courts have continued to recognize the coercive nature of the relationship between a school employee and registered student, even where the student is 18 years old. In *State v. Clinkenbeard*, Division Three discussed the unique access public school employees have to children, often in an unsupervised context and how this access could be

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[11]Former RCW 9A.44.100 (amended in 1988); *Grewe*, 117 Wash.2d at 215.

[12]*Grewe*, 117 Wash.2d at 216.

[13]*Id.*

abused to groom or coerce children or young adults into sexual exploitation.[14] In *Connecticut v. McKenzie-Adams*, the Connecticut Supreme Court determined that their Legislature had a legitimate state interest in prohibiting teachers from using their position of authority to pursue sexual relationships with enrolled students regardless of the age of the student.[15]

The Court of Appeals pointed to Judge Siler's dissenting opinion in *United States v. Rodriguez-Guzman*, 506 F.2d 738, 747 (9th Cir. 2007), as interpreting former RCW 9A.44.093 as setting 18 as the age of "consent" in teacher/student intercourse. Judge Siler's brief analysis was assigned more weight by the Court of Appeals then was warranted. Judge Siler criticized the majority for finding California's statute setting the "age of consent" with regard to statutory rape at 18 where many states set it at 16. Judge Siler pointed out that a minority of the states, including Washington "raise the age of consent to 18 if the actor is a parent, guardian, teacher, person in a position of authority, or another relative."[16] The footnote that followed listed statutes from Alaska, Arkanas, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Louisiana, Mane, Minneapolis, Mississippi, Montana, New Jersey, North Carolina, Ohio,

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[14] *Clinkenbeard*, 130 Wash.App. at 565-67.

[15] *McKenzie-Adams*, 281 Conn. at 507; *see also Ex parte Morales*, 03-05-00489-CR, 212 S.W.3d 483 (Tex.App.2006) upholding Texas's statute criminalizing sexual intercourse between teachers and registered students.

[16] *United States v. Rodriguez-Guzman*, 506 F.3d 738, 748 (2007).

Utah, Vermont, Washington, Virginia and Wyoming. For Washington the citation was to 9A.44.093 in total. The Washington statute cited encompasses not just sexual intercourse between teachers and students but also those in a position of authority, and foster parents.

Judge Siler's survey of then existing statutes did not does not create a binding interpretation of Washington law.[17] Furthermore, to interpret Washington's statute as not restricting the age of the student to eighteen would be consistent with Judge Siler's opinion which argued that the age of consent for statutory rape should be set by individual states.[18]

Abuse of authority is a recognized justification for criminalizing consensual sexual intercourse or contact. These statutes apply regardless of the age of the defendant or victim and are based entirely on the nature of the relationship between the offender and the victim. Custodial Sexual Misconduct criminalizes sexual intercourse or contact between law enforcement officers and those they have arrested and prison guards and inmates.[19] The Indecent Liberties statute criminalizes sexual contact

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[17] *See generally California v. Freeman*, 488 U.S. 1311, 1313, 109 S. Ct. 854, 102 L. Ed. 2d 957 (1989) (O'Connor, J., on application for stay, citing *Michigan v. Long*, 463 U. S. 1032, 1041, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983); interpretations of state law by a state's highest court are binding upon all federal courts, including the United States Supreme Court); *In re Grisby*, 121 Wn.2d 419, 430, 853 P.2d 901 (1993) (Washington Supreme Court is not obligated to follow Ninth Circuit decisions); *State v. Barefield*, 110 Wn.2d 728, 756 P.2d 731 (1988)(same).

[18] *Rodriguez-Guzman*, 506 F.3d at 748.

[19] RCW 9A.44.160, Custodial Sexual Misconduct in the First or Second Degree, prohibits sexual intercourse or contact between a law enforcement officer and any person they have arrested or detained, between an inmate of a jail, prison or detention center with an employee of the jail, prison or detention center who the victim reasonably believes may have influence over the victim's terms, conditions or length of incarceration or a victim on

between chemical dependency treatment facility employees and residents they supervise and care providers in a variety of situations.[20] Neither of these statutes limits their application based upon the victim's age.[21]

The legislature intended former RCW 9A.44.093 and 096 to apply to students over 18. By virtue of former RCW 9A.44.093(3)'s definition of a "school employee" as an employee of a common school or grades kindergarten through twelve at a private school, the school employee will necessarily teach no students enrolled in school beyond 12th grade. This definition supports a broad reading of the term "registered student". Had the legislature intended that the language of the statute limit the victim's age to someone under 18, they would not have needed to include a separate section in the statute specifying that the statute only applies to school employees working with kindergarten through twelfth grade students. To find otherwise renders the language of 9A.44.093(3)

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community supervision and a person who is so employed that the victim might reasonably believe they may have influence over those terms, conditions or length of supervision.

[20]RCW 9A.44.100 Indecent Liberties; applies if (1)the perpetrator is providing a developmentally delayed victim with transportation within the course of his or her employment (9A.44.100(c)(ii))or has supervisory authority over the developmentally delayed victim (9A.44.100(c)(i)); (2)the perpetrator is a health care provider, the victim is a patient or client, and sexual contact occurs without consent during a treatment session, consultation, interview or examination (RCW 9A.44.100(d); (3)the perpetrator has supervisory authority over the victim who is a resident of a facility for persons with mental disorders or chemical dependency (RCW 9A.44.100(e)); (3)the perpetrator has a significant relationship with or is providing transportation as part of his employment to a frail elder or vulnerable adult (RCW 9A.44.100(f)).

[21]A victim of custodial sexual misconduct in the first degree may be a resident of a juvenile correctional facility including detention centers and might therefore be under the age of 18. Similarly there are no limitations in RCW 9A.44.050 or 9A.44.100 indicating a juvenile resident at a chemical dependency or mental health treatment facility cannot be a victim if an employee charged with supervision of that resident has sexual intercourse or contact with that juvenile resident.

meaningless. Because the legislature did not want to include students under 16, it included language that the student must be at least 16. These restriction are only necessary because a "registered student" is sufficiently broad language which can include any "registered student" regardless of their age. Without former RCW 9A.44.093(3), former RCW 9A.44.093(1)(b) would apply to sexual intercourse between a college professor and a student of any age. For this reason, it was necessary that former RCW 9A.44.093(3) be included.

This is also consistent with the dictionary and common usage of the term "student" which is based upon a person's status in an educational establishment, not their age as discussed by the Court of Appeals.[22] The dictionary definition of "student" focuses on the nature of the relationship between the defendant and the victim. This further supports that this offense is a position of authority crime, not an age based crime. The statute's only restriction on the age of the victim is that they must be "at least sixteen".[23]

The word "student" is commonly used to refer to a person's enrollment in an educational establishment, not the person's age. Many establishments offer student fares. However, to receive a student fare, you are typically required to show a valid student identification card, not prove

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[22] *State v. Hirschfelder*, 148 Wash.App. 328, 339-42, 199 P.3d 1017 (2009).

[23] Of course the age of the perpetrator is relevant in limiting the age of the victim. For example, if the victim was 19 and the respondent was 23, the statute would not apply because the perpetrator would not be more than 60 months older than the victim.

you are a certain age. This common usage of the term student is consistent with interpreting the word "student" in Former RCW 9A.44.093(1)(b) as not limiting the age of the victim.

2. By virtue of the Basic Education Act, the victim will necessarily be less than 21 years of age.

The Basic Education Act applies to common schools and specifically requires that basic education be offered to those between five years of age and less than twenty-one. By virtue of this act, a registered student will be less than twenty-one.[24]

B. THE PHRASE "OR KNOWINGLY CAUSES ANOTHER PERSON UNDER THE AGE OF EIGHTEEN TO HAVE" IN FORMER RCW 9A.44.903(1)(b) DOES NOT CREATE AN AMBIGUITY BUT MERELY CREATES AN ALTERNATE MEANS OF COMMITTING THE CRIME.

1. This phrase creates an alternative means of committing the offense, one which does not apply in the present case because the school employee had direct sexual intercourse with the registered student.

The phrase "or knowingly causes another person under the age of eighteen to have" creates an alternative means of committing the offense. Enclosing the phrase in comas indicates it is a non-restrictive clause. Therefore, it is not intended to alter the meaning of the sentence if removed. There are no separate comas off setting the words "under the age of eighteen" from the words "or knowingly causes another person" so

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[24]RCW 28A.150.220(3) reads in pertinent part, "Each school district's kindergarten through twelfth grade basic education program shall be accessible to all students who are five years of age, as provided by RCW 28A.225.160, and less than twenty-one years of age".

the phrase should be read in its entirety. Removing the phrase does not render it meaningless. The alternative means does not apply in this case.

'The 'last antecedent' rule of statutory construction 'provides that, unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent.' A corollary to the rule is that 'the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one."[25]

In *In re Personal Restraing of Mahrle*, 88 Wash.App. 410, 945 P.2d 1142 (1997), RCW 9.94A.150(1) was interpreted to require that a qualifying conviction that was a sex offense be both a class A felony and committed on or after July 1, 1990.[26] Following that decision, the legislature amended the statute adding commas before the word "or" and after the word "felony" to clarify its intent. The amended statute read:

> In the case of an offender convicted of a serious violent offense, or a sex offense that is a class A felony, committed on or after July 1, 1990, the aggregate earned early release time may not exceed fifteen percent of the sentence.[27]

These amendments were found to support the holding that without the commas, each phrase modified every other antecedent qualifying phrase.[28]

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[25]citations and emphasis omitted *In re Personal Restraint of Smith*, 139 Wash.2d 199, 986 P.2d 131 (1999); *citing In re Sehome Park Care Ctr., Inc.*, 127 Wash.2d 774, 781-82, 903 P.2d 443 (1995).

[26]*In re Personal Restraint of Mahrle*, 88 Wash.App. 410, 945 P.2d 1142 (1997).

[27]RCW 9.94A.150(1) Amended by Laws of 1999, ch. 37 §1.

[28]*In re Smith*, 139 Wash.2d 199.

Because the phrase, "or knowingly causes another person under the age of eighteen to have" begins with the word or and is enclosed in commas, much like the amended language of RCW 9.94A.150(1), the qualifying phrases enclosed by commas should not be found to qualify every antecedent in the statute but only those within the commas.

The last antecedent rule should not, however, be used to contort the meaning of a statute.[29] The Court of Appeals concluded the phrase "another person under the age of eighteen to have" must mean there is another person who is *also* under the age of eighteen.[30] Thus, the phrase qualified the victim but not the defendant. This crafts the legislation to reach a desired result without regard to the construction of the statute.

If a defendant were charged with child molestation, this same language would not apply and would be removed from interpretation of the statute. From the text of the statute it is clear that the prohibited conduct is either sexual intercourse between a school employee and a registered student, or a school employee knowingly causing another person to have sexual intercourse with a registered student. The statute's structure is similar to RCWs 9A.44.083, 086 and 089. Each reads as follows:

> A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with

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[29] *In re Kurtzman's Estate*, 65 Wash.2d 260, 263, 396 P.2d 786 (1964).

[30] *Hirschfelder*, 148 Wash.App. at 342-43.

> another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.[31]
>
> A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.[32]
>
> A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.[33]

While the textual similarity is not conclusive evidence that the legislature did not intend the words "under the age of eighteen" to apply to the victim and the third person alike, it demonstrates that this language is standard language used to describe offenses which may be committed through coercion of a third party. The words "under the age of eighteen" do not appear to have unique significance in defining the victim.[34]

In the present case, the sexual contact was alleged between the

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[31]RCW 9A.44.083.

[32]RCW 9A.44.086.

[33]RCW 9A.44.089.

[34]While admittedly, the victim is each 9A.44.083, 086 and 089 will necessarily be under the age of eighteen. It would be possible for this language to restrict the offender, leading to the conclusion that the offender must be another person who is under eighteen. However, this language has never been interpreted to limit the age of the defendant and it is equally as unintended to limit the age of the victim or defendant in RCW 9A.44.093(1)(b).

teacher and the registered student. The State does not ask the Court to "read out" out portion referring to "under the age of eighteen" but asks the Court to treat this language the same way it does the language "or knowingly causes another person". This language is not meaningless, it simply does not apply to the present case.

2. "Under the age of eighteen", following the phrase "another person" was not intended to apply to the victim because additional age qualifying language as to the victim was included in subsection (a) but not subsection (b) when subsections (a) and (b) were created in 2001.

Language describing the victim was not excluded from subsection (b) as surplusage. The Court of Appeals noted that "the "under the age of eighteen" limitation was in several earlier drafts of the legislation, which did not pass into law" and concluded "that the legislature removed the 'under the age of eighteen' age limitation as mere surplusage."[35] It is a strained interpretation to find the language of the statute to be ambiguous but conclude that language considered, but not included, which, if included would limit the age of the victim to 18, must have been removed as surplusage.

Subsection (a) contains the same phrase "or knowingly causes another person under the age of eighteen to have" but also says the victim must be at least sixteen but less than eighteen. If the words "another person under the age of eighteen" as included in the coma enclosed phrase were intended to limit the age of the victim, the additional restriction on

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[35] *Hirschfelder*, 148 Wash.App. at 348-49 n. 15.

the age of the victim in subsection (a) would have been surplusage as well. The reason the "under the age of eighteen" language was not included in subsection (b) is because the legislature did not wish to limit the age of the victim in subsection (b) to someone under the age of eighteen.

C. THE WORD "MINOR" IN THE TITLE OF FORMER RCW 9A.44.093 DOES NOT CREATE AN AMBIGUITY BECAUSE THE TITLE DOES NOT CONTROL THE STATUTE.

The use of the term "minor" in the surrounding statutes or section title, does not create an ambiguity in the text of the statute. The word "minor" appears in the title of the offense, not as an element of the offense. The title of the bill does not control the elements of the offense.[36] Because the plain language in the body of the statute is not ambiguous, the case title should not be considered.

The Court of Appeal's application of the definition of "minor in RCW 9.68A is unsupported.[37] There are no internal references to RCW 9.68A in former RCW 9A.44.093 to support use of this definition. Furthermore RCW 9.68A limits the definition of "minor" in that chapter.[38]

Referring to RCW 9.68A is unlike the reference to RCW 74.13.020(5) and 28A.150.220(3). Former RCW 9A.44.093 contains the

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[36]RCW 9A.44.903 "Section captions as used in this chapter do not constitute any part of the law."

[37]*Hirschfelder*, 148 Wash.App. at 338-39.

[38]RCW 9.68A.011 clearly limits the application of the definitions to this chapter: "the definitions in this section apply throughout this chapter."

terms "foster child" and "registered student" each of which define criteria for falling within each category. RCW 74.13.020(5) legally limits who fits into the category of "foster child" regardless of the application. Similarly, RCW 28A.150.220(3) legally limits, as to age, who may fall into the category of "registered student". These categories set forth by the legislature, further define the victim in former RCW 9A.44.093(1)(b) and (c). Therefore, reference to each of them is appropriate.[39]

D. IN AMENDING FORMER RCW 9A.44.093 IN 2001THE LEGISLATURE INTENDED TO CRIMINALIZE SEXUAL INTERCOURSE BETWEEN A SCHOOL EMPLOYEE AND REGISTERED STUDENT OF THE SCHOOL EVEN IF THE REGISTERED STUDENT WAS OVER 18 YEARS OLD.

1. The statutory context of former RCW 9A.44.093 indicates the legislature intended to criminalize sexual intercourse between consenting adults based upon the coercive nature of the relationship.

By setting the minimum age of the victim at 16, the legislature indicated its awareness it was criminalizing what would otherwise be considered consensual sexual intercourse. In reviewing the statutory context of former RCW 9A.44.093 the Court of Appeals noted that "Sexual misconduct with a minor" is grouped with other sex offenses involving child victims[40] to support its conclusion the term "minor" in the title means a person under eighteen. The full statutory context of former

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[39]Which is quite similar to the analysis completed by Division II in interpreting an insurance contract containing the term "foster child" in *Wheeler v. Rocky Mountain Fire & Casualty Company*, 124 Wash.App. 868, 873, 103 P.3d 240 (2004).

[40]*Hirschfelder*, 148 Wash.App. at 338-39.

RCW 9A.44.093, however reveals the statute is also grouped with sex offenses involving abuse of a position of authority as discussed above.

Former RCW 9A.44.093 involves victims that are at least 16 years of age, this contrasts starkly with RCW 9A.44.076 through 089, all of which involve victims that are less than 16 years of age. There are clear distinctions between former RCW 9A.44.093 and 096 and the surrounding statutes with child victims.

None of the victims in former RCW 9A.44.093 or 096 are under the age of 16 because the statutes specifically require that the victim be at least 16 years of age. In comparison, all of the victims in the surrounding sex offenses against children are 16 years of age or younger.[41] Furthermore, the titles of each of these offenses involving victims under the age of 16 all contain the word "child" in the title. The titles of former RCW 9A.44.093 and 096 contain the word "minor".

The language of former RCW 9A.44.093(1) is consistent with statutes regulating an abuse of a position of authority. None of the crimes

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[41]RCW 9A.44.073 Rape of a Child in the First Degree; the victim must be less than 12 years old and the perpetrator must be at least 24 months older than the victim; RCW 9A.44.076Rape of a Child in the Second Degree; the victim must be at least 12 years old but younger than 14 years old and the perpetrator must be at least 36 months older than the victim; RCW 9A.44.079Rape of a Child in the Third Degree; the victim must be at least 14 years old and but younger than 16 years old and the perpetrator must be at lest 48 months older than the victim; RCW 9A.44.083Child Molestation in the First Degree; the victim must be less than 12 years old and the perpetrator must be at least 36 months older than the victim; RCW 9A.44.086Child Molestation in the Second Degree; the victim must be at least 12 years old but not more than 14 years old and the perpetrator must be at least 36 months older than the victim; and RCW 9A.44.089Child Molestation in the Third Degree; the victim must be at least 14 years old but not more than 16 years old and the perpetrator must be at least 48 months older than the victim.

involving sex offenses against children cited by the Court of Appeals defines any relationship that must exist between the defendant and the victim. In contrast, former RCW 9A.44.093 does not apply unless there is a specific authoritative relationship between the defendant and the victim. This is similar to statutes criminalizing sexual intercourse or contact between law enforcement officers and those they have arrested, prison guards and inmates and chemical dependency treatment facility employees and residents they supervise involve adults over the age of 18. Viewing the language of former RCW 9A.44.093 as a whole, it is far more similar to offenses involving a violation of a position of authority than those involving child victims of sex offenses.

When the original amendment in 2001 was vetoed by the Governor the legislature passed a new bill which added the requirement the defendant be at least 60 months older than the registered student.[42] This was in response to the Governor's concern the originally enacted statute criminalized sexual intercourse between two students if one was also employed by the school.[43] If the youngest a victim could be is 16, that is 60 months younger than someone who is 21. Had the legislature intended the legislation only apply to students under 18, they would not have needed a 60 month age difference because once the student turned 18, they could have sexual intercourse with other students even if the other student

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[42]Third Engrossed Substitute S.B. 6151, 57th Leg. 2d Spec. Sess. (Wash. 2001).

[43]1 Legislative Digest and History of Bills, 57th Leg., at 504 (1st ed. Wash.2001).

was employed by the school. The legislature's decision to create a 60 month age difference requirement shows their intent the statute not limit the age of the victim to someone under 18.

The legislature divided former RCW 9A.44.093 into two distinct subsections in 2001 and added a third subsection in 2005. Each of these three subsections addresses a different abuse of a position of authority and the language in each of these subsections demonstrates the separate considerations made by the legislature in establishing the criteria for the victim of each offense. Subsection (a) recognizes that a person 16 to 18 might be coerced into having sexual intercourse with a person with whom they have a significant relationship due to that person's abuse of a position of authority within that relationship. Subsection (b) deals with the position of authority a school employee has with a registered student. Subsection (c) deals with the position of authority a foster parent has with his or her foster child.

Subsection (c) was added in 2005. The Court of Appeals found the legislature's House Bill Reports in that amendment explained the legislature intended subsection (b) only apply to students under 18. The Bill Report used the term "minor" when referring to the victim who is a registered student and stated "the law should protect children under 18 from coaches, mentors, foster parents , and others".[44] However, the

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[44] *Hirschfelder*, 148 Wash.App. at 347, *citing* Final B. Rep. On Substitute S.B. 5309, at 1, 59th Leg., Reg. Sess. (Wash.2005).

amendment enacted in 2005 did not alter the language of former RCW 9A.44.093(1)(b). SSB 5309 amended the definition of "abuse of a supervisory position" in RCW 9A.44.010, a phrase used in former RCW 9A.44.093(1)(a) and 096(1)(a) and created RCW 9A.44.093(1)(c), criminalizing sexual contact between a foster parent and foster child. The Final Bill Report for Substitute S.B. 5309 does not express the legislative intent in enacting former RCW 9A.44.093(1)(b) because Substitute S.B. 5309 did not amend or alter former RCW 9A.44.093(1)(b).

2. New legislative action indicates the Legislature intended former RCW 9A.44.093(1)(b) to criminalize sexual intercourse between school employees and registered students, even if the student is 18.

On May 4, 2009 Governor Christine Gregoire signed Engrossed House Bill 1385 which amended RCW 9A.44.093 and RCW 9A.44.096 in pertinent part to read, "an enrolled student of the school who is at least sixteen years old and not more than twenty-one years old". The statute also added a subsection to RCW 9A.44.093(3) and 096(3) defining an "enrolled student".

> [W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight and particularly so when the precise intent of the enacting Congress is obscure.[45]

This Court has a unique insight due to the legislature's clear, prompt and

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[45] *Rozner v. City of Bellevue*, 116 Wash.2d 342, 347, 804 P.2d 24 (1991), *citing Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596, 100 S.Ct. 800, 63 L.Ed.2d 36 (1980).

overwhelming response to *Hirschfelder* in passing Engrossed House Bill 1385 amending RCW 9A.44.093(1)(b) to read as follows:

> (b) the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with an enrolled student of the school who is at least sixteen years old and not more than twenty-one years old and not married to the employee, if the employee is at least sixty months older than the student.

EHB 1385 also added the following definition:

> "Enrolled Student" means any student enrolled at or attending a program hosted or sponsored by a common school as defined in RCW 28A.150.020, or a student enrolled at or attending a program hosted or sponsored by a private school under chapter 28A.195 RCW, or any person who receives home-based instruction under chapter 28A.200RCW.[46]

If the court finds that former RCW 9A.44.093(1)(b) was ambiguous, these amendments may provide the Court with the legislature's view of the legislative intent. Like the amendments in *In re Smith*, 139 Wash.2d 199, where the legislature added punctuation to RCW 9.94A.150(1) between the decision of the court of appeals and the Supreme Court's review of the issue, the legislature in the present case enacted legislation adding additional words specifically addressing the lower court's interpretation of the statute. This amendment is probative of the legislative intent because there has not been a significant passage of time since the original legislative creation of former RCW 9A.44.093(1)(b) in 2001.

This is also similar to *Hale v. Wellpinit School District No. 49*,

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[46]Laws of 2009, ch. 324.

165 Wash.2d 494,508, 198 P.3d 1021 (2009), where the Court adopted the definition of disability used by Congress in the Americans with Disabilities Act and the legislature subsequently enacted legislation rejecting the definition of disability adopted by the Court. The Court did not find the amendment useful for the separation of powers analysis but noted, changes to a statute may be helpful in determining legislative intent.[47] This recent legislative action is further indication that the legislature's intent was to criminalize sexual intercourse between a teacher and registered student even if the student is 18.

III. CONCLUSION

The State respectfully requests that the Court reverse Court of Appeals, reinstate the charge, and remand this matter for trial.

DATED this 3rd day of August, 2009.

Respectfully Submitted,

By: _____
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[47] *Wellpinit*, 165 Wash.2d at 508, *citing 1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wash.2d 566,584, 146 P.3d 423 (2006).